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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-262

ROY M. RAMIREZ and GEORGE BALLAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Roy M. Ramirez and George Ballan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming his criminal conviction.

Opinion Below

The opinion of the Court of Appeals affirming the convictions appears in Appendix A to this brief. The order of the Court of Appeals denying the petition for rehearing and rehearing *en banc* appears in Appendix B to this brief. The District Court did not deliver an opinion.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit affirming the conviction was entered on May 29, 1973. The order of the Court of Appeals denying the petition for rehearing and rehearing *en banc* was filed on July 9, 1973. This petition for certiorari is filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. May petitioners, convicted of violating 21 U.S.C. 176 (a), be sentenced under the successor statutes, 21 U.S.C. 801 *et seq.*, when they were indicted after repeal of the old law and when the new statute imposes lighter sentences for the same offense?

2. Does sentencing the petitioners under the harsher penalties of the old law, rather than the more lenient penalties of the new law, violate the Eighth Amendment's prohibition of cruel and unusual punishment where Congress, in reducing the penalties for the same acts, recognized that the harsher sentences are excessive and unnecessary for achieving the purpose for which the punishment is inflicted?

Statute Involved

Section 1103 (a) of the Comprehensive Drug Abuse and Prevention Control Act, P.L. 91-513—Oct. 27, 1970, 84 Stat. 1294, reads as follows:

"Pending Proceedings*

"Sec. 1103. (a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof."

Statement of the Case

The petitioners, Roy M. Ramirez and George Ballan, were indicted, along with sixteen others, for a single count of conspiracy to import, receive, conceal and transport marijuana in violation of 21 U.S.C. 176 (a). The indictment was returned on September 16, 1971, four months after 21 U.S.C. 176 (a) had been repealed and replaced by the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. 801 *et seq.*, effective May 1, 1971.

The petitioners Ramirez and Ballan were tried along with two co-defendants** in the United States District Court for the Northern District of California before Frey, D.J. and a jury. After motions for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure were granted

* The caption "Pending Proceedings" appears in the official version of the Act. The reprint of 1103 in the United States Code and United States Code Annotated (see, 21 U.S.C. Secs. 171 to 174, note) quotes the language of 1103 (a) without the "Pending Proceedings" caption and under a heading entitled "Savings Provision." The version of the statute contained in U.S.C. and U.S.C.A. is not the official version, since Title 21 U.S.C. is not one of the Titles enacted into positive law under 1 U.S.C. Sec. 204. The Statutes at Large, in which the "Pending Proceedings" caption appears, is, of course, the correct reading. *Royers* v. *United States*, 265 F.2d 615 (3d Cir. 1959).

** Of the other 14 indicted co-defendants, two pleaded guilty, eight were severed on motion of the government, and four were fugitives at the time of trial.

as to the co-defendants, Elizabeth Ballan and Brian Rohan, the petitioners were found guilty by the jury.

On June 30, 1972, Ramirez was sentenced under the provisions of 21 U.S.C. 176 (a) to seven years in prison and a fine of $15,000, while Ballan was sentenced to five years in jail and a fine of $5,000 under 21 U.S.C. 176 (a).

The judgment was affirmed upon appeal by the Court of Appeals for the Ninth Circuit in a per curiam opinion, with Circuit Judge Hufstedler dissenting. On July 9, 1973 a petition for rehearing and rehearing *en banc* was denied.

Statement of the Facts

The evidence adduced at trial established the existence of an operation engaged in the importation, transportation and sale of marijuana. The operation commenced sometime before January of 1969 with the activities of defendants Franklin and Sayre (RT 206, 293, 294) and continued until after the fall of 1970. Defendants Rushing and Shubin joined the operation in early 1969 and worked trucking and flying loads of marijuana from Mexico, through Arizona and Southern California, to the San Francisco Bay area (RT 48-49, 52, 55-59, 294, 295-97, 301-02). Defendant Houle joined in late 1969 (RT 207-12). In the early part of 1970, Houle, Shubin and Rushing participated in several shipments to San Francisco, working closely with Sayre and Franklin (RT 214-17, 305-07).

In February and March, 1970, Franklin purchased the Elk Pine Ranch in Arizona through Martin Humphrey,

a real estate salesman, and Brian Rohan, an attorney and co-defendant (RT 63-64, 439-43, 445-46, 449, 660-68). An airstrip was constructed on the ranch in March (RT 224-27, 573). Defendant Craig was hired as caretaker on the ranch (RT 324-25, 328).

In April, 1970, a Cessna 206 airplane was purchased, apparently on behalf of Franklin, for use in the operation (RT 417, 419-20, 501-12, 537, 564).

Loads of marijuana were trucked from the ranch to the San Francisco area through the summer of 1970. A new driver at this time was defendant Badaracco. Defendants Kamler and Fahey assisted in the distribution of the loads (RT 109-12, 251-54, 310, 598).

After Franklin, Houle and Badaracco were arrested with a load of marijuana in their possession at the ranch in August, 1970, the operation continued to truck marijuana from other parts of Arizona; new drivers were hired (RT 120-24, 259-60, 612-13, 262-64). During this period two trucks were purchased by members of the operation under the cover name of American Development Company (RT 126-28, 178-79, 695-97), although it was not established that these trucks ever transported marijuana.

Evidence adduced by the prosecution in establishing a conspiracy consisted of 28 witnesses. Of these 28 witnesses, only four testified in regard to petitioner George Ballan. Three of these four were the sole witnesses against petitioner Roy Ramirez.

Co-defendant and prosecution witness William Shubin testified that he had met petitioner Ballan on two occasions.

The first was in May of 1970 at Jon Franklin's ranch (RT 92-95). Shubin testified he subsequently flew with Ballan to Mexico where a load of paper-wrapped, brick-shaped objects were picked up and transported back to the ranch (RT 96-100, 108-09).

Shubin testified in regard to petitioner Ramirez that he had met at the Host International Restaurant at the Los Angeles International Airport in the summer of 1969 (RT 53); that he had subsequently met him at the Ontario Airport in either the fall of 1969 (RT 85) or the fall of 1970 (RT 54). He further testified that he was present in a motel room in Tucson when Ramirez delivered a briefcase containing $10,000 for defendant Franklin (RT 125-26).

Shubin admitted on the stand that he had in the past committed perjury, specifically in lying to the Grand Jury originally investigating this case (RT 144, *et seq.*).

Co-defendant Harold R. Houle testified to seeing George Ballan three times in 1970; twice at Jon Franklin's ranch (RT 240-44) and once sitting in a car with Jon Franklin in Winslow, Arizona (RT 249-50).

His testimony regarding Roy Ramirez is equally as fragile. He had heard the name "Roy" before (RT 253) and had seen Ramirez in a restaurant conversing with Jon Franklin (RT 258).

William Craig testified only as to George Ballan. He stated that he recognized Ballan as someone known to him as "Benny the Bomber", whom he had previously seen at Franklin's ranch, and that "Benny" had once or twice flown into the ranch what Craig believed to be marijuana (RT 325-38).

The final witness against petitioners herein, one Paul Hopkins, a co-conspirator and pilot for Jon Franklin, testified to a conversation in July of 1970 with Jon Franklin and George Ballan regarding Hopkins' future flights for Franklin (RT 395-96). The witness Hopkins testified against Roy Ramirez concerning a meeting with Mr. Ramirez at the Host International Restaurant at which time appellant Ramirez marked a map where Hopkins could land a plane in Mexico (RT 383). The area was not a landing strip nor was Mr. Ramirez or anyone else there when Hopkins flew the plane to that area (RT 388).

At this point in the trial, the Honorable William C. Frey commented in regards to the prosecution's evidence that there were "enough inconsistencies to give little weight" to the evidence (RT 359-60).

Roy Ramirez, in testifying on his own behalf, denied ever having seen either Paul Hopkins or Harold Houle before. He further testified that the money given to Jon Franklin was a payment of a loan (RT 883-85).

The sole physical evidence introduced against petitioners herein consisted of the map allegedly marked by appellant Ramirez for the use of Paul Hopkins (RT 383) and some papers seized from the purse of Elizabeth Bowers Ballan at the time of the Ballans' arrest (RT 756-57). These papers consisted of a flight authorization linking the Ballans with Jon Franklin (RT 846-48) and the written name and address of a San Francisco attorney used as a forwarding address for the American Development Company (RT 580-81, 756-57).

Reasons for Granting the Writ

I. The petitioners, convicted for violation of 21 U.S.C. 176 (a), must be sentenced under 21 U.S.C. 801 *et seq.* when they were indicted after the repeal of the old statute and when the new statute imposes lighter sentences for the same offense.

The petitioners were indicted on September 16, 1971 for violating 21 U.S.C. 176 (a), a statute that had been repealed four months earlier. On May 1, 1971 the old drug law was superseded by the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. 801 *et seq.* Under the old law, a mandatory minimum sentence of five years in jail was required, and probation was precluded (26 U.S.C. 7237 (d)), while under the law in effect at the time of indictment, trial and sentence, the proscribed punishment for marijuana trafficking is zero to five years in jail, and probation is permissible (21 U.S.C. 960). Here, the petitioner Ramirez was sentenced under the old law to seven years in jail, a penalty beyond the scope of the provisions of the new statute, while petitioner Ballan received the lightest jail term allowable under the old law—the mandatory five-year minimum—which, however, is the same as the maximum penalty under the new law. It is petitioners' contention that since they were indicted when the new law was already in operation, they should have been sentenced under the new law, and that nothing in the savings provision of Section 1103 (a) of the new act or in *Bradley* v. *United States,* —— U.S. ——, 93 S.Ct. 1151 (1973), compels a contrary conclusion.

Section 1103 (a) of the new law, the saving provision, provides:

"Pending Proceedings

"Prosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) * * * or abated by reason thereof."

In *Bradley* v. *United States,* —— U.S. ——, 93 S.Ct. 1151 (1973), the Supreme Court considered whether the new law sentencing provisions were applicable to a case where the indictment was filed before the new law became effective, but where the conviction and sentencing occurred five days after repeal of 176 (a). Bradley argued that while the prosecution was saved by 1103 (a), since it began before May 1, 1971, the sentence was not, because the sentence is not part of the prosecution, and it occurred after May 1, 1971. This Court held however that the sentence is an integral part of the "prosecution," and was therefore similarly saved by 1103 (a).

Clearly, *Bradley* did not directly resolve the issue presented here. For in the present case, the indictment was returned after May 1, 1971. And the indictment, by initiating in this case the formal judicial criminal proceedings, was the beginning of prosecution (see, *e.g., Kirby* v. *Illinois,* 406 U.S. 682 (1972) *Massiah* v. *United States,* 377 U.S. 201 (1964); *Spano* v. *United States,* 360 U.S. 315 (1959); *Powell* v. *Alabama,* 287 U.S. 45, 66-71 (1932). Thus, the issue in the present case, and it is the issue that divided the court below, is what the savings clause really means. Does it save for the old law prosecutions, no matter when they begin, for *acts* occurring prior to May 1, 1971, or does it

save only *prosecutions* which began before May 1, 1971 which, naturally, subsume violations of law occurring prior to the effective date of the act? In other words, do the words "occurring prior to the effective date" modify "prosecutions" or "violations of law"?

Petitioners contend that the answer of dissenting Judge Hufstedler is the correct one, both in its reliance on *Bradley*, insofar as it applies to the issue in this case, and in its reading of 1103 (a):

> "The keystone of the *Bradley* rationale is its construction of the word 'prosecutions' in section 1103 (a) as 'clearly importing a beginning and an end.' The 'end,' as *Bradley* squarely held, is the conclusion of sentencing. The 'beginning' of a prosecution is the return of an indictment. These indictments were returned after section 176 (a) had been repealed. There was no prosecution to be saved by section 1103 (a). *Bradley* means that any prosecution initiated before repeal of the statute carries with it the old section 176 (a) penalty. Conversely, any prosecution under section 176 (a) begun after repeal of section 176 (a) for the substantive offense committed before repeal carries with it the milder penalties of the successor statute.
>
> The substantive offense was specifically saved. Prosecutions initiated before repeal were 'not * * * affected' or 'abated.' Prosecutions begun after repeal of section 176 (a) could be neither affected nor abated, because they were nonexistent when the old statute was repealed."

Importantly, the interpretation of Judge Hufstedler is supported by reading 1103 (a) in conjunction with the stat-

utory caption. The caption, of course, is normally read with the text of a statute to resolve ambiguity. *Knowlton* v. *Moore*, 178 U.S. 41 (1900); *Maguire* v. *Commissioner of Internal Revenue*, 313 U.S. 1 (1941); *Magnolia Liquor Co.* v. *Cooper*, 231 F.2d 941, 945 (5th Cir. 1956). In the present instance, the caption "Pending Proceedings" (84 Stat. 1239, see fn. p. 3, *infra*) makes clear that it is prosecutions *pending* at the time of the change in law that are saved by 1103. Cases such as the present one, where the acts occurred prior to May 1, 1971 but proceedings commenced afterwards are not affected, since, as in the present case, there was no "Pending Proceedings" as of May 1, 1971.* Thus, *Bradley* is fully consistent with petitioners' interpretation, since, in *Bradley*, there was a pending proceeding in existence on May 1, 1971 to which 1103 specifically relates.

Furthermore, when Congress has on past occasions really intended to insure that the stricter penalties of a repealed law are preserved for *all* violations of the prior law, it has written a specific saving clause which did just that in express terms. For instance, in *United States* v. *Kirby*, 176 F.2d 101 (2d Cir., 1949), the defendant had been con-

* The majority below, citing *United States* v. *Cummings*, 468 F.2d 274 (9th Cir. 1972), felt that the substantive offense, as distinct from the penalty provisions, was clearly saved by the general savings clause, 1 U.S.C. 109, and the dissent, stating that the substantive offense was saved, agreed. The majority argued simply that "it could not have been the intent of Congress to grant amnesty to the unapprehended as of May 1, 1971, while continuing interdiction and punishment for essentially the same conduct for violations occurring after May 1, 1971." The same, of course, cannot be said for the penalty provisions, for the Congress clearly intended to reduce the punishment for the same acts that previously drew higher penalties. Thus, in the same way as congressional intent is served by saving the substantive offense, the congressional intent is violated by saving the discredited sentencing scheme.

victed for violation of 18 U.S.C. §317 which imposed harsher penalties than the replacement statute which was in effect when the defendant's prosecution began. The Court held that the earlier penalty applied because the repealing act contained an express saving clause which—unlike §1103(a) —specifically preserved the more stringent penalty:

> "The repealing Act, Sec. 21 of the Act of June 25, 1948, 62 Stat. 862, in this instance * * * expressly provided that 'any rights or liabilities now existing * * * shall not be affected by this repeal.' "

Congress avoided using this saving clause in its repeal of §176(a), and since they were aware that an alternative to §1103(a) which would save the harsher penalty (and obviate any confusion as to the effect of §109) had been used successfully in the past, the "clear implication" is that only the new penalties prescribed by 21 U.S.C. §801, *et seq.*, were intended to apply.

The majority below, however, drew upon one sentence from *Bradley* to support affirmance.* But analysis of the quoted passage in the context of the *Bradley* opinion shows that it is wholly inappropriate to the issues presently raised. Significantly, the quotation is culled from Part II of the opinion which specifically deals with the "special problem of the parole eligibility of offenders *convicted before* May 1, 1971". (93 S.Ct. at 1155, emphasis added). The Court held that the five-year minimum sentence must be applied to such offenders (those convicted before May 1, 1971) and held parole unavailable under 18 U.S.C. 4208 (a)

* "As we have said, sentencing is part of the prosecution. The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971." 93 S.Ct. at 1155.

to those convicted before May 1, but who were serving their sentences after that date. Thus, section II of the Court's opinion does not at all relate to the present petitioners who were convicted after May 1.

In any event, even if there is some lingering doubt as to whether the harsher penalties are saved, judicial authority requires such doubts to be resolved in favor of leniency. In *Bell* v. *United States*, 349 U.S. 81, 83 (1954), this Court specifically held that as a matter of law, genuine ambiguity regarding sentence length should be resolved in the defendant's favor:

> "It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenieney. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.*" (Emphasis added.)

Indeed, other jurisdictions follow the rule that requires the imposition of the lighter penalties. In the more enlightened jurisdictions in this nation such as New York and California, the courts have held that when the legislature

replaces a statute with one which prescribes lighter penalties, those are the penalties that must be applied in pending prosecutions. In *People* v. *Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197 (1956), the highest New York court held that even though that state had a general savings clause (substantially similar to §109), the lesser penalties of the new statute had to be imposed rather than those of the more stringent repealed law.

> "And, indeed, where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date. (citations)
>
> "This application of statutes, reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; *the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.* As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty

> should be imposed in all cases that subsequently reach the courts." (Emphasis added.) *Oliver, supra,* at 201-202.

The same decision was reached by the California Supreme Court in *In re Estrada*, 63 C.2d 740, 48 Cal.Rptr. 172 (1964), even though California also has a general saving statute. The extent to which California courts will go to adhere to the "spirit"—and not just the "letter"—of the *Oliver-Estrada* rule is illuminating. In *People* v. *Labrum*, 25 Cal.App.3d 107, 101 Cal.Rptr. 602 (1972), the defendant was originally charged under Welfare and Institution Code §3002 which provided for a sentence of up to seven (7) years. Between the time the defendant was charged and the beginning of his trial, a new statute, Penal Code §4530(c), became the law. The new law prescribed a maximum penalty of five (5) years and held also that convictions thereunder did not count as a "prior" felony conviction in any future proceedings against the defendant. The defendant was convicted and sentenced under the old law. The appellate court reversed:

> "If we uphold the judgment in its entirety, we condone the defendant's conviction for a crime, which, by legislative decree, is no longer as serious an offense as that for which he stood trial * * *." *Labrum* at 605.

The Court was then presented with a dilemma in that by merely following the "letter" of the *Estrada* rule (and thereby upholding the conviction under the old law, while applying the new penalty) it would have left the defendant with a "prior" felony conviction on his record. In order to make the sentence consistent with the legislative determination that conviction for this type of offense (escape by an addict participating in a special "3 day community

release" program) should not haunt the defendant's record—and in order to adhere to the "spirit" of *Estrada*—the Court hit upon the novel solution of finding the new statute to be a "lesser included" offense within the old. It then voided the conviction under the old law and remanded to have the defendant sentenced in accord with the new statute.

In the same spirit as *Bell, Oliver* and *Estrada,* this Court should seek to effectuate the congressional intent to reduce penalties in any way consistent with a reasonable reading of an ambiguous statute. After all, if the old penalty provisions are mechanically held to apply to acts committed before May 1, 1971, these outdated sanctions can be given effect until expiration of the statute of limitations for 176 (a). It would be anomalous indeed, for instance, to sentence a defendant in 1976 to penalties five years out-of-date. Indeed, in many instances the disparity in penalties between the old and new law is enormous. For instance, possession of marijuana, now a possible misdemeanor (see, 21 U.S.C. 844), previously mandated a five-year minimum sentence and allowed a maximum of twenty years in jail. To permit the specter of such a harsh law to creep years into the future in direct contradiction of the legislative intent to end its existence makes no sense at all.

Accordingly, since the imposition of the outdated and more rigorous penalties applied in this case is not required by either statutory interpretation or case law, much less by principles of fundamental fairness or enlightened judicial opinion, the petitioners should be sentenced under the law in effect at the time they were prosecuted.

II. Sentencing petitioners under the harsher penalties of 21 U.S.C. §176(a) rather than the more lenient penalties of 21 U.S.C. §801 *et seq.* is cruel and unusual punishment and is proscribed by the Eighth Amendment.

The Eighth Amendment prohibits "cruel and unusual punishments." It is clear that a punishment which is in the abstract neither cruel nor unusual may be held to be such if the circumstances attendant to its imposition bring it within that proscription. *Robinson* v. *California,* 370 U.S. 660 (1962), *Furman* v. *Georgia,* 408 U.S. 238, 92 S.Ct. 2726 (1972). Petitioners* contend that there are three aspects of this case which make their sentences cruel and unusual within the meaning of the Eighth Amendment. Specifically, sentencing under the old law imposes a penalty which is excessive and unnecessary to achieve any congressional purpose embodied in the act; secondly, old law sentencing requires adherence to an arbitrary cut-off date which bears no relation to the seriousness of the crime or degree of culpability; and thirdly, in the context of the present case, it allowed effectuation of the trial judge's expressed bias against the petitioner Ramirez, as a person of Mexican extraction.

Preliminarily, however, it is necessary to deal with the Court of Appeals' brief and incorrect approach to the issue. In this regard, the Circuit Court held that "sentences under Sec. 176(a) were not cruel and unusual punishment prior to repeal. They do not become so by the later pro-

* While the Court of Appeals wrote that Ramirez alone raised the issue of cruel and unusual punishment, the argument was also advanced below by the petitioner Ballan (see, appellants' opening brief, p. 29; closing brief, p. 6; petition for rehearing, Point II, pp. 5-6).

mulgation of less severe penalties for similar prohibited conduct." This view, that if the penalty was not cruel and unusual in the past, it is not cruel and unusual now is simply a misstatement of the law. Rather, as correctly expressed by Justice Marshall in *Furman* v. *Georgia*:

> "Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again in the prior opinions of this Court: i.e., the cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Thus, a penalty which was permissible at one time in our Nation's history is not necessarily permissible today.*" 92 S.Ct. at 2772. (Emphasis added.)

Consequently, in contrast to the view of the Court below, the very fact that the punishment has changed to conform to the "evolving standards of decency that mark the progress of a maturing society" is some evidence of present constitutional unacceptability of the previous harsher standard. Indeed, in *People* v. *Lorentzen*, 194 N.W. 827 (Mich. 1972), the Michigan Supreme Court held the penalty imposed upon a defendant convicted of possessing marijuana to be cruel and unusual, and cited as a compelling factor in its decision the fact that the Michigan drug law had been changed after the conviction to reduce the penalties to conform to evolving standards.

Thus, once it is clear that the old law penalties are not immune from Eighth Amendment attack simply because they were not judged cruel and unusual when they were in effect, it becomes just as clear that there are substantial reasons for viewing these harsh provisions as violative of the Eighth Amendment when they are imposed after repeal of the statute.

A. Sentencing petitioners under 21 U.S.C. 176(a) serves no Congressional purpose and perpetuates penalties now recognized by Congress as excessive.

As explained by Justice Marshall in *Furman* v. *Georgia*, "a penalty may be cruel and ususual because it is excessive and serves no valid legislative purpose * * *. The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and ususual punishment clause is to prevent excessive or unnecessary penalties." 92 S.Ct. at 2773. "This Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel * * * the cruel and unusual language of the Eighth Amendment immediately follows language that prohibits *excessive* bail and *excessive* fines. The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" 92 S.Ct. at 2774 (emphasis in opinion).

Mr. Justice Brennan, in his opinion in *Furman, supra*, also delved deeply into the principles underlying the "cruel and unusual" clause:

> "A third principle inherent in the clause is that a severe punishment must not be unacceptable to contemporary society * * *. The question under this principle, then, is whether there are objective indications from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use * * *. The final principle inherent in the clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unneces-

> sary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. *If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, cf. Robinson* v. *California, supra,* at 66; *id.* at 677 (Douglas, J., concurring); *Trop* v. *Dulles* [356 U.S. 86 (1958)] at 114 (Brennan J., concurring), *the punishment inflicted is unnecessary and therefore excessive.*" (Emphasis added.) 92 S.Ct. at 2746-2747.

Continuing, Justice Brennan in advocating his "factor" approach to the question of cruel and unusual punishment, stated:

> "Nor is it likely that this court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor finally, it is likely that this court will have to consider a severe punishment that is patently unnecessary; no state today would inflict a severe punishment knowing that there was no reason whatever for doing so." 92 S.Ct. at 2748

May the Federal Judiciary do what the Supreme Court has said the state may not do? It is submitted that the Congress of the United States has decided along with the Prettyman and Katzenbach Presidential Commissions that the mandatory minimum sentence and long terms prescribed by §176(a) are "unacceptable" and "unnecessary" as those terms are used by Justice Brennan. The Congressional will is the "objective indicator" of unacceptability, and the determination that lighter sntences are adequate (indeed more adequate—see U.S. Code *Congressional and Administrative News* 1971 at 4576) to

achieve socviety's purpose makes whatever "extra years" the petitioners in this case might serve wholly unnecessary.

Indeed, the legislative history of the new drug law reveals beyond any doubt that the sentencing structure was changed because it was determined to be too harsh and infflexible, and because the penalty provision was felt to be ill suited to contemporary legislative ends (*e.g.*, 3 U.S. Code Cong. & Ad. News (1970) at pp. 4567, 4570-1, 4574-6, 4582, 4584-8). "The bill is designed to meet problems that have arisen under existing narcotic and dangerous drug laws due to recent governmental reorganization, court rulings, and the changing posture of the drug problem facing thsi country" (*id.* at 4571). In accordance with the recommendations of the Prettyman Commission, Congress adjusted sentencing in the new law "to fit the gravity of the particular offense" by the "elimination of almost all mandatory minimum sentences, as well as elimination of the prohibition against probation and parole of narcotic offenders" (*id.* at 4584-5). The report rejected "the severity of existing penalties" (*id.* at 4575) and substituted "sentencing provisions generally left to the discretion of the courts" (*id.* at 4571). Indeed, the legislative history shows clearly that the old severe sentences were both excessive and unnecessary to achieve any legislative goal. This finding is, of course, not surprising, since the old penalties were fashioned at a time when marijuana was widely and erroneously regarded as a "killer weed", physically and mentally debilitating to the user. However, the increasing and prevelant use of marijuana in recent years by non-criminal elements of society, mainly for recreational and social purposes, spurred deeper study into the subject.

As informed authorities, including the official report of the National Commission of Marijuana and Drug Abuse established under the 1970 Drug Control Act (the Shafeer Report), recognize, millions of Americans use marijuana, especially middle class citizens gainfully employed and successful in society and in professions such as medicine, law, business, banking and education (*e.g.*, Shafer Report, p. 92). Since marijuana is less harmful than alcohol or tobacco, the report recommends decriminalization for personal use. Recent court decisions also give legal recognition to the new insights about marijuana by declaring harsh penalties for its use as cruel and unusual punishment, by taking marijuana out of the class of narcotic drugs, and by advocating the legalization of marijuana use. See, *People* v. *Lorentzen*, 194 N.W. 827 (Mich. 1972); *State* v. *Kantner*, 53 Haw. 327, 492 P.2d 306 (1972); *People* v. *Sinclair*, 194 N.W. 878, 893-4 (Mich. 1972); *People* v. *McCabe*, 275 N.W. 2d 407 (Ill. 1971); *English* v. *Miller*, 341 F. Supp. 714 (D.C.Va. 1972). In the face of these authorities, both legal and scientific, that marijuana does not deserve the panicky and fearful reaction that enveloped it in the past, it is anomalous to carry over the penalties associated with ignorance of the subject to a time when even Congress declared reductions in penalties salutory. And, in view of the more enlightened approach presently taken, the prior penalties of the old law can only be regarded as shamefully excessive reactions which, when applied in the present, serve no legislative purpose and thus can only be termed cruel and unusual punishments.

B. Sentencing petitioners under 21 U.S.C. §176(a) requires adherence to an arbitrary cut-off date.

While the petitioners in this case were being sentenced under the harsher provisions of 21 U.S.C. §176(a), defendants in unrelated cases were being tried at the same time and for substantially the same offense under 21 U.S.C. §801 et seq., and receiving the lesser penalties of 21 U.S.C. §960; thus, introducing the element of arbitrariness into the administration of criminal justice.

In *United States* v. *Stephens*, 449 F.2d 13 (9th Cir., 1971), the Ninth Circuit rejected overstrict adherence to cut-off dates as they pertained to the prohibition against probation contained in 21 U.S.C. §176(a)—and instead, followed a course which permitted,

> "* * * a salutory tempering of the arbitrariness which would result from hewing to a cut-off date in transition from old law to new law and an approach to even-handed dispensation of justice not otherwise available." *Stephens* at 106

Justice Douglas, in *Furman, supra,* in condemning arbitrary sentencing, said:

> "There is evidence that the provision of the English Bill of Rights of 1689 from which the language of the Eighth Amendment was taken was concerned with selective or irregular application of harsh penalties * * *." 92 S.Ct. at 2728.

Mr. Douglas went on to quote a Congressional witness:

> "Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustfly applied. The vice in this case is not in the penalty but in the process by

> which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is.*" (Emphasis added.) 92 S.Ct. at 2731

Clearly, a "process" which allows the length of a defendant's sentence to be determined neither by the gravity of his offense nor by his past record, but merely by the date on which his offense was committed (in this case, prior to May 1, 1971) involves an irregular and arbitrary dispensation of justice and as such is cruel and unusual in its operation.

C. Sentencing under 21 U.S.C. §176(a) allowed effectuation of the trial judge's bias against petitioner Ramirez.

Justice Douglas, in *Furman,* 92 S.Ct. at 2732, observed:

> "There is an increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishment. 'A penalty * * * should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." Quoting from Goldberg & Derschowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1790.

Petitioner Ramirez was given a seven year sentence by Judge Frey. This is two years longer than either the statutory minimum under 21 U.S.C. §176(a) or the statutory maximum under 21 U.S.C. §960. In the course of setting bail pending appeal, Judge Frey revealed his bias by setting bail for petitioner Ballan at $25,000 and for petitioner Ramirez at $35,000, despite the fact that Ramirez had been free during the pendency of the trial on his personal recognizance (RT 1028:20-21; RT, June 20, 1972, at 4A and 7).

The judge's explanation of his action establishes his prejudice against Mexican-Americans:

> "And, Mr. Ramirez, for your information the difference in the bail between you and Mr. Ballan is based on evidence which I heard during the course of this trial as to your involvement in this case and your connections in Mexico and the Court's experience with defendants such as yourself, either charged or convicted, seeking haven in Mexico, particularly when they have contacts in Mexico. And we have any number of them down there that we would just love to get back and close out files on, pending down in the Southern District of Arizona." (RT, June 20, 1972, at 7).

It is evident that petitioner Ramirez, a United States citizen of Mexican descent, resident of the Coachella Valley in California since 1932, a man with no prior record, may owe his two "extra" years to the sentencing judge's bias, and that this is "cruel and unusual" punishment. In addition, bias on the part of the sentencing judge deprives the petitioner Ramirez of his right to due process of law.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

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